

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

IN RE: THE PETITION OF	:	
SPRINT COMMUNICATIONS L.P. D/B/A	:	
SPRINT COMMUNICATIONS COMPANY L.P.	:	
FOR CONSOLIDATED ARBITRATION UNDER	:	05-0402
THE TELECOMMUNICATIONS ACT TO	:	
ESTABLISH TERMS AND CONDITIONS FOR	:	
INTERCONNECTION WITH CERTAIN ILLINOIS	:	
INCUMBENT LOCAL EXCHANGE CARRIERS.	:	

**MOTION TO DISMISS  
OF HARRISONVILLE TELEPHONE COMPANY  
MARSEILLES TELEPHONE COMPANY AND  
METAMORA TELEPHONE COMPANY**

NOW COME Respondents, Harrisonville Telephone Company, Metamora Telephone Company and Marseilles Telephone Company (jointly, “Moving RLECs”) and respectfully request that the Illinois Commerce Commission (“Commission”) enter an Order dismissing the Petition for Arbitration filed herein by Sprint Communications L.P. d/b/a Sprint Communications Company L.P. (“Sprint”) and in support thereof states as follows:

1. Sprint’s requests for negotiation of Interconnection Agreements with the RLECs and its Petition for Arbitration in connection therewith are premature.

2. With respect to the underlying service at issue in this proceeding, which by Sprint’s own admission utilizes Voice over Internet Protocol (“VOIP”) technology (See, Sprint Petition at p. 16), the FCC has declared the service to be an interstate service,<sup>1</sup> and has reiterated that Congress has given it **exclusive jurisdiction** over all interstate communications and all persons engaged in such communications. Vonage Order at p. 9, para. 16. Furthermore, the

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<sup>1</sup> *See Generally, FCC Memorandum Opinion and Order, In the Matter of Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, Adopted: November 9, 2004 Released: November 12, 2004 (“Vonage Order”).*

FCC in the Vonage Order specifically deferred the decision whether to classify IP-Enabled Services, including VOIP, as either “telecommunications services” or “information services” to itself as part of its pending rulemaking proceeding involving IP-Enabled Services.<sup>2</sup> *Id.* at pp. 8-9, para. 14 and footnote 46.

3. As part of its pending IP-Enabled Services Proceeding, the FCC has also specifically undertaken consideration of the question whether providers of IP-Enabled Services, including VOIP, are entitled to reciprocal compensation under Section 251(b)(5) of the Federal Telecommunications Act or whether such services are subject to interstate and intrastate access charges. The pertinent provisions of the FCC’s Notice of Proposed Rulemaking in the IP-Enabled Services Proceeding read as follows:

61. The Commission seeks comment on the extent to which access charges [footnote omitted] should apply to VoIP or other IP-enabled services. [footnote omitted] If providers of these services are not classified as interexchange carriers, or these services are not classified as telecommunications services, should providers nevertheless pay for use of the LECs’ switching facilities? As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways. Given this, under what authority could the Commission require payment for these services? If charges should be assessed on these services, should they be the same as the access charges assessed on providers of telecommunications services, or should the charges be computed and assessed differently? How should different charges be computed and assessed? By seeking comment on whether access charges should apply to the various categories of service identified by the commenters, we are not addressing whether charges apply or do not apply under existing law. [footnote omitted]

62. If, on the other hand, VoIP or other IP-enabled services are classified as telecommunications services, should the Commission forbear

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<sup>2</sup> See *FCC Notice of Proposed Rulemaking, In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Adopted: February 12, 2004, Released: March 10, 2004, 19 FCC Rcd 4863 (“IP-Enabled Services Proceeding”).

from applying access charges to these services, or impose access charges different from those paid by non-IP-enabled telecommunications service providers? If so, how should different charges be computed and assessed? If commenters believe charges should be assessed, must carriers pay access charges, or should they instead pay compensation under section 251(b)(5) of the Act? [footnote omitted] Would assessment of rates lower than access charge rates require increases in universal service support or end-user charges? If no access charges, or different charges, are assessed for VoIP and IP-enabled service providers' use of the PSTN, would identification of this traffic result in significant additional incremental costs?

Reciprocal compensation, as opposed to access charges, is one of the key elements, if not the key element, that Sprint seeks in its proposed Interconnection Agreement.

4. It should be noted that if IP-Enabled Services, including VOIP, are "information services" as the U.S. District Court for the District of Minnesota found them to be,<sup>3</sup> and as the Moving RLECs believe them to be, the proper compensation mechanism under the Federal Telecommunications Act and the FCC's existing rules would be access charges, not reciprocal compensation.<sup>4</sup>

5. Sprint makes every effort in its Petition for Arbitration and the pre-filed testimony of its witness in this proceeding to distinguish the underlying service at issue in this proceeding from the IP-Enabled Services that are under consideration by the FCC in its IP-Enabled Services Proceeding (and that were the subject of the Vonage Order). The Commission, however, need

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<sup>3</sup> *Vonage Holding Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003), *affd. on other grounds*, 394 F.3d 568 (8th Cir. 2004).

<sup>4</sup> 47 USC, sec. 251(g) ("each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996); *Order on Remand and Report and Order in the Matter of Implementation of "Local Compensation Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Dockets 96-98 and 99-68 adopted April 18, 2001, released April 27, 2001, (the term "information access" means "to or from" an "information service provider"); 47 CFR 51.701(b) (reciprocal compensation applies only to "telecommunications traffic," and "telecommunications traffic" does not include information access).

not and should not entertain Sprint's arguments on this matter in light of the clear language used by the FCC in both the Vonage Order and the Notice of Proposed Rulemaking in the IP-Enabled Services Proceeding.

6. In the Vonage Order, the FCC said, "Accordingly, to the extent other entities, **such as cable companies, provide VoIP services**, [footnote 113]<sup>5</sup> we would preempt state regulation to an extent comparable to what we have done in this Order." pp. 21, para. 32.

7. In the Notice of Proposed Rulemaking in the IP-Enabled Services Proceeding, the FCC said:

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<sup>5</sup> Footnote 113 to the Vonage Order, which appears on pp. 21-22, lists a number of comments from cable industry spokesmen as follows:

See, e.g., Letter from J.G. Harrington, Counsel for Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 1-2 (filed Oct. 27, 2004) ("This network design also permits providers to offer a single, integrated service that includes both local and long distance calling and a host of other features that can be supported from national or regional data centers and accessed by users across state lines. . . . In addition to call setup, these functions include generation of call announcements, record-keeping, CALEA, voice mail and other features such as \*67, conferencing and call waiting. . . . [T]here are no facilities at the local level of a managed voice over IP network that can perform these functions."); Letter from Henk Brands, Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 2, 9 (filed Oct. 29, 2004) (Time Warner Oct. 29 Ex Parte Letter) ("[T]he Commission should take a broader approach by recognizing additional characteristics of IP-based voice services and extend the benefits of preemption to all VoIP providers. . . . [B]y its nature, VoIP is provided on a multistate basis, making different state regulatory requirements particularly debilitating."); NCTA Oct. 28 Ex Parte Letter, Attach. at 1 ("Cable VoIP offers consumers an integrated package of voice and enhanced features that are unavailable from traditional circuit-switched service. . . . A cable company may have no idea whether a customer is accessing these features from home or from a remote location. The integral nature of these features and functions renders cable VoIP service an interstate offering subject to exclusive FCC jurisdiction. . . . Not every cable VoIP service has the same mix of features and functionalities . . . , but all cable VoIP offers the types of enhancements that render it an interstate service. Similarly, while the network architecture of each cable VoIP system will not be identical, they share the same centralized network design that impart an interstate nature."); Letter from Daniel L. Brenner, Senior Vice President, Law & Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, Attach. at 1 (filed Oct. 27, 2004) ("Functions integral to every call, such as CALEA compliance, voicemail recording, storage, and retrieval, call record-keeping, 3-way calling and other functions are provided from these central facilities. These facilities are often located in a state different from the origin of the call.") (Emphasis Added).

“IP-enabled services, such as VoIP, also can be – and often are – provided over cable facilities. What impact, if any, should the provision of broadband over cable plant have on the Commission’s treatment of IP-enabled services? What effect, if any, does Title VI of the Act have on any potential regulation of cable-based IP-enabled services?<sup>200</sup> If the Commission determines that IP-enabled services, or any particular class of IP-enabled services, are telecommunications services, should the Commission forbear from applying certain Title II provisions to cable providers’ offering IP-enabled services? Alternatively, if the Commission determines that some or all IP-enabled services constitute information services, could the Commission use its ancillary jurisdiction to apply any Title II-like obligation to any cable providers of IP-enabled services? If so, what is the basis for an exercise of that authority? Finally, is any class of IP-enabled services properly classified under the Act as “cable service”?<sup>201</sup> If so, what regulatory requirements, if any, would apply to those services? Specifically, should any class of VoIP or other IP-enabled service be construed to be a “cable service” for franchising purposes?<sup>202</sup> In responding to these questions, we ask commenters to explain whether the Commission should make any distinction among categories of cable providers for regulatory purposes.” pp. 47-48, para. 70.

8. The FCC has indicated its intent to decide these questions. The FCC has exclusive jurisdiction. Therefore, these matters should be left to the FCC, and Sprint’s Petition for Arbitration should be dismissed as premature.

9. It appears that even Sprint’s business associate, MCC, recognizes that these questions are to be answered soon by the FCC. In the same MCC tariff that Sprint cites at p. 16, footnote 16 of its Petition for Arbitration, MCC has hedged its own bets with the following language:

The Company [MCC] files this Tariff reserving and without waiving its right to argue in the future that *the Services and products herein are not subject to some or all State regulation and Company expressly reserves the right to withdraw the Tariff and its Certificate should Company determine that applicable law does not require such filings*. By submitting this Tariff the Company does not concede that its services are intrastate in nature or that it is practicable to regulate them simultaneously at the state and federal levels, but rather acknowledges that, as of the time of this filing, the precise description, definition, and jurisdiction of its Services provided in whole or in part over Internet Protocol is unresolved at this time. (Emphasis added.)

10. In its Petition for Arbitration and the prefiled testimony of its witness, Sprint also goes out of its way to distinguish the underlying service at issue in this proceeding from the cable modem information service described recently by the United States Supreme Court *National Cable & Telecommunications Association v. Brand X Internet Services*, Slip Op. No. 04-277 (S. Ct. June 27, 2005). However, Sprint has misunderstood the importance of the U.S. Supreme Court's Brand X decision. It is important to the ultimate issue in this case and in the FCC's IP-Enabled Services Proceeding (that being whether IP-Enable services are "information services" or "telecommunications services"). The Ninth Circuit Court of Appeals had held that even cable modem service that did not include voice was both an "information services" and a "telecommunications services." That decision gave IP providers, like Sprint/MCC, the green light to argue that their service is telecommunications and thereby attempt to impose reciprocal compensation obligations on ILECs, rather than paying access charges. The Supreme Court's reversal of the Ninth Circuit decision puts the issue back in the hands of the FCC where it belongs. This Commission should do the same thing by dismissing Sprint's Petition for Arbitration and this proceeding. The FCC will decide whether IP-Enabled Services, including cable VOIP, are "information services" or "telecommunications services" and whether the appropriate compensation mechanism is reciprocal compensation or access charges.

## **CONCLUSION**

For the foregoing reasons the Moving RLECs respectfully request that the Commission dismiss Sprint's Petition for Arbitration.

*Dated this 14th day of July, 2005.*

Respectfully submitted,

/s/ Troy A. Fodor

By: \_\_\_\_\_

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CERTIFICATE OF SERVICE

05-0402

The undersigned, Troy A. Fodor hereby certifies that on the 14<sup>th</sup> day of July, 2005 he served a copy of the foregoing instrument by personally delivering a copy thereof and or mailing a copy thereof by electronic mail and/or United States Mail, postage prepaid, at Springfield, Illinois to the individuals named on the attached Service List.

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/s/ Troy A. Fodor

Troy A. Fodor